FILE COPY

FILED
JAN 8 19[illegible]
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 38

GEORGE LEE PARKER,

Petitioner,

vs.

O. B. ELLIS, General Manager, Texas Prison System,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

FRANK M. WOZENCRAFT,
Counsel for Petitioner,
1600 Esperson Building,
Houston 2, Texas.

Of Counsel:

WILLIAM F. WALSH,
1116 Capitol Avenue,
Houston 2, Texas.

WALTER E. WORKMAN,
1600 Esperson Building,
Houston 2, Texas.

INDEX

SUBJECT INDEX

	Page
Brief for Petitioner	1
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	7
Summary of Argument	14
Argument	16
I. Petitioner's State Trial Was Replete With Prejudicial Error Which Any Texas Lawyer Could Have Recognized and Prevented and Which Deprived Petitioner of a Fair Trial and of Due Process of Law	16
II. This Court Should Exercise Its Discretionary Authority to Issue a Writ of Habeas Corpus *Nunc Pro Tunc* as of a Date While Petitioner Was Still in the Custody of Respondent	24
Conclusion	31
Appendix	33

CITATIONS

CASES:

Betts v. *Brady*, 316 U.S. 455	21, 23, 31
Brown v. *State*, 114 S.W. 820	17
Cash v. *Culver*, 358 U.S. 633	14, 22, 23, 24, 27, 31
Dickson v. *Castle*, 244 F. 2d 665	27
Gibbs v. *Burke*, 337 U.S. 773	23
Harris v. *Commissioner*, 340 U.S. 106	26
Harwell v. *Morris*, 143 S.W. 2d 809	30
Heflin v. *United States*, 358 U.S. 415	28
Hines v. *State*, 248 S.W. 2d 156	19
Logan v. *United States*, 144 U.S. 263	30

	Page
Matterson v. *State*, 152 S.W. 2d 352	20
McNally v. *Hill*, 293 U.S. 131	28
Mitchell v. *Overman*, 103 U.S. 62	26
Morre v. *State*, 324 S.W. 2d 879	22, 31
Otts v. *State*, 116 S.W. 2d 1084	18
Palmer v. *Ashe*, 342 U.S. 134	31
Pollard v. *United States*, 352 U.S. 354	15, 27
Quon Quon Poy v. *Johnson*, 273 U.S. 352	25
Randolph v. *State*, 265 S.W. 2d 114	19
Rice v. *Olson*, 324 U.S. 786	23
Robidoux v. *State*, 34 S.W. 2d 863	18
Shipley v. *State*, 100 S.W. 2d 704	19
Smith v. *Lynn*, 152 S.W. 2d 838	17
Thalemeyer v. *State*, 43 S.W. 83	17
Turner v. *State*, 176 S.W. 2d 327	17, 18
United States v. *Paddock*, 68 F. Supp. 407	31
Uveges v. *Pennsylvania*, 335 U.S. 437	23
Williams v. *Kaiser*, 323 U.S. 471	23

STATUTES:

28 United States Code:	
Sec. 1254	2, 3
Sec. 1651	2, 3, 24, 32
Sec. 2106	3, 24, 32
Sec. 2241	2, 4, 24, 25, 27, 28, 32
Sec. 2255	15, 27, 28
14 Vernon's Penal Code of Texas:	
Art. 979 (Forgery)	4, 17
Vernon's Code of Criminal Procedure of Texas:	
Art. 494 (Appointment of counsel) (as amended effective June 1, 1959)	5, 22
Art. 727 (When confession shall not be used)	5, 18
Art. 732a (Indictment, information or complaint not admissible to impeach witness)	6, 19

OTHER AUTHORITIES:

Texas Constitution, Art. 3, Sec. 51-C	29
Branch's Annotated Penal Code of Texas, 2d Ed., Sec. 1580, Vol. 3	17
1 Freeman on Judgments (1925 Ed.)	25

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 38

GEORGE LEE PARKER,

Petitioner,

vs.

O. B. ELLIS, General Manager, Texas Prison System,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 80-90) is reported at 258 F.2d 937.

Jurisdiction

The judgment of the Court of Appeals was entered August 29, 1958 (R. 91). On September 29, 1959, petition for rehearing (R. 91-96) was denied by the Court of Ap-

peals (R. 97). Petition for writ of certiorari was filed October 24, 1958, and on March 2, 1959, was granted with leave to proceed in forma pauperis. The jurisdiction of this Court rests on 28 U.S.C. 1254(1), 28 U.S.C. 1651 and 28 U.S.C. 2241.

Questions Presented

I.

Whether a sick, aged and indigent defendant is deprived of due process of law in violation of the Fourteenth Amendment to the United States Constitution when he is left to defend himself, without counsel, in a State felony trial, and is convicted despite the fact that:

(a) The indictment is invalid as a matter of State law;

(b) The evidence is wholly insufficient to sustain conviction;

(c) Inadmissible and prejudicial evidence is repeatedly tendered by the prosecution and admitted in evidence by the court; and

(d) The judge fails to instruct the jury as to the elements of the offense and as to the affirmative defenses raised by the evidence.

II.

Whether this Court has lost its power to correct erroneous decisions of lower federal courts denying habeas corpus to a State prisoner, thereby leaving in effect erroneous federal precedents which adversely affect his rights, simply because he has completed serving his sentence after this Court has granted certiorari but before it has entered judgment.

Constitutional Provisions and Statutes Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1254, Title 28, United States Code provides in pertinent part:

> "§ 1254. Court of Appeals; certiorari; appeal; certified questions.
>
> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

Section 1651, Title 28, United States Code provides in pertinent part:

> "§ 1651. Writs
>
> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. * * *"

Section 2106, Title 28, United States Code provides:

> "§ 2106. Determination
>
> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or

reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Section 2241, Title 28, United States Code provides in pertinent part:

"§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the District Courts and any circuit judge within their respective jurisdictions. . . .

" • • •

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

" • • •

"(3) He is in custody in violation of the Constitution or laws or treaties of the Unted States; or

" • • • "

Article 979, Title 14, Vernon's Penal Code of Texas provides:

"Article 979. 924, 530, 431 'Forgery'

"He is guilty of forgery who without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever."

Article 494, Vernon's Code of Criminal Procedure of Texas, as amended effective June 1, 1959; Vernon's 1959 Texas Session Law Service, Pamphlet 5, p. 1061, provide:

"Section 1. That Article 494, Vernon's Code of Criminal Procedure, is amended to read as follows:

" 'Article 494.

" 'Whenever it is made known to the court at an arraignment or any other time that an accused charged with a felony is too poor to employ a counsel, the court shall appoint one (1) or more practicing attorneys to defend him.

" 'The counsel so appointed shall have ten (10) days to prepare for trial, unless such time be waived in writing by said attorneys and the accused.'

"Sec. 2. The fact that Article 494 applied to capital cases and does not apply to ordinary felonies creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three separate days in each House be suspended, and this Rule is hereby suspended, and that this Act take effect and be in force from and after its passage and be it so enacted."

Article 727, Vernon's Code of Criminal Procedure of Texas provides:

"Art. 727. When confession shall not be used

"The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him;

which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed. If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness."

Article 732a, Vernon's Code of Criminal Procedure of Texas provides:

"Art. 732a. Indictment, information or complaint not admissible to impeach witness

"The fact that a defendant in a criminal case, or a witness in a criminal case, is, or has been, charged by indictment, information or complaint, with the commission of an offense against the criminal laws of this State, of the United States, or any other State shall not be admissible in evidence on the trial of any criminal case for the purpose of impeaching any person as a witness unless on trial under such indictment, information or complaint a final conviction has resulted, or a suspended sentence has been given and has not been set aside, or such person has been placed on probation and the period of probation has not expired."

Statement

1. The Trial in the Texas Courts.

A. *The Indictment and the Preliminary Proceedings*

A Texas grand jury indicted Parker for forging the name "Elzie Quattlebaum" to a $38.00 check payable to "G. L. Parker" and signed "Phoebia Quattlebaum x B Elzy Quattlebaum" (R. 5-6). The relationship between these people was never revealed in the trial court. It was first clarified in an affidavit submitted by Parker's wife to the U. S. District Court in connection with Parker's application for a writ of habeas corpus, in which she explained that (1) "Phoebia Quattlebaum" was her mother, and thus was Parker's mother-in-law, and (2) "Elzie Quattlebaum" was her brother and Parker's brother-in-law, and "for several years" had been Parker's "bitter enemy" (R. 42).

Parker's application also alleged that at the time of the trial he was 67 years old, and was suffering from organic heart disease for which he was receiving treatment in jail (R. 2).

When the case was called for trial, the following colloquy took place (R. 57-58):

> The Court: I am calling for trial Cause Number 503, styled the State of Texas against George Lee Parker. Is that you?
>
> Mr. Parker: That is right.
>
> The Court: You were indicted by a Grand Jury of this county on July 26 of this year, charged with the offense of forgery. Are you ready for trial?
>
> Mr. Parker: Yes, sir.
>
> The Court: Do you want a trial by jury or without a jury?

Mr. Parker: Well, it is immaterial to me, Judge. I don't have any attorney.

The Court: Well, you are going to have to make up your mind. It is certainly immaterial to the court.

Mr. Parker: I guess a jury then.

The Court: You want a trial by jury?

Mr. Parker: Yes, sir.

The Court: Do you have a lawyer hired?

Mr. Parker: No, sir, I don't.

The Court: The law does not require the court to appoint an attorney to represent a defendant where he has a trial by jury and it is not the practice of this court to appoint any attorney to represent the defendant. It is up to him to arrange for his own counsel. Now, if you are eligible for a suspended sentence, why, then, the court would get some lawyer to advise you about the procedure in filing your application for a suspended sentence but only for that part and only if you are eligible for a suspended sentence. If you are not qualified to get a suspended sentence, there would not be any sense in applying for it.

Mr. Parker: No.

The Court: If you want to apply for a suspended sentence, you let me know and I will arrange for a lawyer to help you with that part only.

Mr. Parker: I will not apply for any suspended sentence.

The Court: All right. I believe you said you were ready for trial.

Mr. Parker: Yes, sir.

In a certificate presented to the U. S. District Court by the State of Texas, the trial judge admitted advising petitioner "that no counsel would be appointed on a plea of not guilty before a jury in a non-capital offense case"

and that "no counsel was appointed for him" (R. 30). The State judge also certified that petitioner declined to examine the veniremen on their *voir dire* and declined to exercise his preemptory challenges (R. 30).

B. The Evidence at the State Trial.

1. *The State's Case as Presented by the District Attorney*

Four witnesses testified against Parker (R. 59-71) before the State rested its case. Phoebia Quattlebaum, in whose name the check described in the indictment was drawn (R. 5-6), was never called as a witness. Petitioner, representing himself, waived his right to examine each prosecution witness (R. 65, 67, 69, 71). He did not object to any testimony or to the introduction in evidence of six checks not mentioned in the indictment (State's Ex. 2 through 6, R. 61-64).

Elzie Quattlebaum explained that Phoebia Quattlebaum was his mother (R. 59). He swore that he had never before seen the check in question (R. 59), although it had been given to him by a relative "down home" (R. 60), that he did not sign the check (R. 59, 65), that he did not authorize the defendant (R. 59) or anyone (R. 65) to sign it or to use his mother's name (R. 59-60) or his own name (R. 60).

Quattlebaum was also allowed to testify that his mother "didn't authorize anyone to use that signature" (R. 65) and had never "gotten her money back on those checks" (R. 60).

When the District Attorney asked whether he knew petitioner, Quattlebaum gave the following answers (R. 59):

A. I know of him.

Q. Well, he is the defendant sitting here, isn't he?

A. I think so.

Q. Well, as a matter of fact, you know he is, don't you, Mr. Quattlebaum? A. Yes.

Q. How long have you known him? A. Well, a long time.

Asked whether the checks were in petitioner's handwriting, Quattlebaum was allowed to answer, "I reckon they are; they sure ain't in mine" (R. 64).

An officer of the bank to which the checks in question were presented, who had worked for the bank 21 years (R. 65) and who had "examined and seen lots of handwriting" (R. 67), thought that identifying the handwriting of the indorsements "G. L. Parker" would be a "pretty difficult question" (R. 67). He said, "That don't look too much like some of the signatures of his that I have seen" (R. 66). A teller for the same bank "handled" three of the seven checks introduced in evidence (R. 69), saw the petitioner indorse one of those checks (R. 70), and testified that when one of these checks was returned she contacted petitioner who told her later "that he had contacted this person and she had told him to write another check" (R. 70).

The local sheriff testified that petitioner admitted writing the checks (R. 68) and added that petitioner "has been in very ill health. I have had to buy him medicine and had to take him up and give him shots. I believe the doctor says he has heart trouble" (R. 68).

The District Attorney asked the sheriff the following question and received the following answer (R. 68-69):

Q. I believe after he was out on bond—originally, after he was indicted, didn't you have another check or two come in on him? A. Yes, sir. We had some small checks.

2. Petitioner's Effort to Defend Himself

In his certificate to the U. S. District Court, the State trial judge said, "If I had observed any evidence indicating that the defendant was handicapped either mentally or physically, the case would not have been tried at that time, irrespective of any request for postponement by the defendant" (R. 30).

At the trial before this judge, petitioner called seven witnesses (R. 71-76). He asked each of them "Tell the jury what you know about me", or words to that effect (R. 71, 72, 73, 74, 75). They testified that "his physical condition, according to everything, is bad or, at least, the doctors say so, you know . . . I do know that he needs medical care" (R. 71), that "he is ill with heart trouble" (R. 73), that, "I don't know—you know—much about the old man only, you know, his health. I do know that he don't have any health" (R. 74) and that "about all I know about him is that the old fellow has heart trouble" (R. 75).

After the testimony of each of these witnesses, petitioner said, "That is all", or words to that effect (R. 72, 73, 74, 75). Petitioner saw fit to conclude his examination of his last witness, however, with the expression, "Ask him anything you want" (R. 75). Then the following cross-examination took place (R. 76):

> Q. You have had some bad checks from Mr. Parker yourself, haven't you? A. Yes, sir.
>
> Q. Still have some on him? A. Yes, sir.
>
> Q. Were those written on his own name or someone else's name? A. In his name.
>
> Q. Just hot checks he had given you? A. Yes, sir.
>
> Mr. McDonald: I believe that is all.

3. *The District Attorney's Rebuttal*

In rebuttal, the State called the local sheriff again. He testified that he had "received the record from the FBI on Mr. Parker" (R. 76) and that it showed Parker had been "in the penitentiary" nine times "regardless of the cause" (R. 77). The sheriff said Parker had never been sentenced or tried in Texas on any offense (R. 78), but that another forgery indictment was pending against Parker (R. 76).

4. *The Result of the Trial*

Instructed by the judge that the maximum sentence was seven years (R. 26), the jury returned a verdict convicting petitioner and assessing his punishment at seven years (R. 26). A motion for new trial, based on insufficiency of evidence and denial of counsel, was overruled (R. 56-57). In a 73-word opinion not included in this record but reproduced as Appendix A to this brief, the Court of Criminal Appeals of Texas affirmed the conviction. *Parker v. State*, 276 S.W. 2d 533. No application was made for review by this Court.

II. The Collateral Attack

A. *Petitioner's State Habeas Corpus Application*

Parker presented a petition for a writ of habeas corpus to the Court of Criminal Appeals of Texas (R. 35-37), claiming that he was unlawfully denied counsel, that he was physically unable to defend himself, and that the evidence was insufficient (R. 36-37). In a 141-word opinion dated September 21, 1955 (R. 10), that court held that petitioner had not shown that he needed a lawyer, that if he was too ill to stand trial he should have filed a motion for continuance, and that the question of sufficiency of

evidence "was disposed of adversely to his contention in the appeal. . . ." The Court of Criminal Appeals did not grant petitioner leave to file his petition (R. 10) and this Court denied certiorari on February 27, 1956 (R. 29).

B. *Petitioner's Federal Habeas Corpus Application*

Turning to the federal courts, petitioner filed an application for a writ of habeas corpus in the Southern District of Texas on May 31, 1956 (R. 1-3). At least three times while this case was pending in the District Court, petitioner asked that some lawyer be appointed to help him present his case (R. 15, 44, 53).

Petitioner's hand-written claim was that he was denied counsel (R. 1); that he was too sick at the time of trial to help himself (R. 2), that the jury was hand-picked by the county attorney (R. 2), and that the evidence was insufficient to sustain his conviction (R. 2-3).

The District Court ordered the State of Texas to answer petitioner's pleadings and established a time-table for briefs (R. 16-18), without suggesting that petitioner needed the lawyer he had already requested (R. 15). Later the District Court called for deposition, affidavits and briefs (R. 45-46), still leaving petitioner without a lawyer, and finally dismissed the case on January 8, 1957, because no record of facts had been developed in accordance with that order (R. 46-47).

Parker finally managed to obtain a transcript of his trial with the help of a fellow prisoner, who purchased it for $25 and loaned it to Parker on March 22, 1957. Parker filed it in the District Court with his motion for rehearing on April 29, 1957 (R. 47-55). This motion for rehearing, accompanied by another motion seeking appointment of counsel (R. 53), was denied by the District Court on June

24, 1957 (R. 79). The Court of Appeals for the Fifth Circuit affirmed such denial 2 to 1, with Judge (now Chief Judge) Rives dissenting.

Summary of Argument

It is settled by the decisions of this Court that due process requires a State criminal court to tender the assistance of counsel to one accused of serious offenses where the complicated nature of the offense charged and the possible defenses thereto, in the light of the age and condition of the defendant, render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair. A review of the record of petitioner's trial makes it clear that this line of decisions is directly applicable here.

Petitioner could not possibly be expected to know what any Texas lawyer should have known: That his indictment was defective under Texas law; that no evidence was introduced as to crucial elements of the offense charged; that the sheriff's testimony as to his confession, on the basis of which the Court of Criminal Appeals affirmed his conviction, was not admissible if properly objected to; that he could have prevented the State from introducing evidence as to his prior convictions and his indictment in another case; and that the judge's instructions to the jury did not include the affirmative defenses which he was entitled to raise.

In the light of his age and illness and his obvious inability to conduct an adequate and fair defense, as well as the complexity of the issues which the evidence presented, this case comes squarely within the area defined by this Court in *Cash* v. *Culver*, 358 U.S. 633, in which a defendant has a constitutional right to be provided with counsel. The issue is so clear-cut that this Court with

entire propriety could have summarily reversed the decisions of the lower courts and either remanded the cause or issued a writ of habeas corpus itself.

On June 6, 1959, more than three months after this Court granted his petition for certiorari, Parker completed serving his sentence with time off for good behavior and was released from custody. However, this Court has inherent discretionary authority to issue a writ of habeas corpus to petitioner *nunc pro tunc* as of the day on which certiorari was granted, or any other date prior to his release from custody.

Such a judgment is particularly appropriate in view of the delay caused by the lower court's refusal to appoint counsel for Parker in accordance with his request. Here, as in *Pollard* v. *United States*, 352 U.S. 354, Parker's conviction may entail collateral disadvantages which justify this Court in dealing with the merits of Parker's petition. Although that case was brought under 28 U.S.C., Sec. 2255, the same considerations should be applicable here.

Moreover, this Court should not allow the erroneous opinion of the Court of Appeals for the Fifth Circuit to remain in force as a precedent for future litigation. By issuing a writ of habeas corpus *nunc pro tunc*, this Court will erase the continuing consequences to Parker of the erroneous decisions of the lower federal courts, and will substitute a correct precedent for future litigation.

ARGUMENT

I.

Petitioner's State Trial Was Replete With Prejudicial Error Which Any Texas Lawyer Could Have Recognized and Prevented, and Which Deprived Petitioner of a Fair Trial and of Due Process of Law.

George Lee Parker's Texas trial has run the gantlet of review in the State courts. Nevertheless, no Texas lawyer can read this record carefully without painful awareness of the shameful ease with which the prosecution overwhelmed this uncounseled petitioner, particularly since the practice of requiring a pauper to defend himself in felony trials has since been repudiated in Texas by both the courts and the Legislature.

Neither the indictment, nor the evidence, nor the instructions to the jurors provided a proper basis for Parker's conviction. The failure of State and Federal judges in Texas to recognize the validity of Parker's claims can be accounted for only by the fact that Parker has not had a lawyer's help until the filing of this brief—the precise objection which Parker has been trying to raise in his labored, handwritten pleadings.

1. *The Indictment.*

It is clear that the legal instrument which brought Parker into court in the first place was fatally defective as a matter of Texas law. The indictment (R. 5-6) charged that Parker forged the name "Elzie Quattlebaum" to a check signed "Phoebia Quattlebaum" by "Elzy Quattlebaum." The Texas cases are legion that such an indictment is invalid because of a fatal variance between the purport clause, describing the name alleged to be forged, and the

tenor clause, describing the instrument. Under Texas law, if an instrument alleged to be forged is signed "B" by "A", the indictment must allege that the name of "B" was forged as well as the name of "A", since "B" is the person purportedly bound by the instrument. See *Thulemeyer* v. *State*, 38 Tex. Cr. R. 349, 43 S.W. 83, and the cases collected in Branch's Annotated Penal Code of Texas, 2nd ed., sec. 1580, Vol. 3, p. 721.

2. *The Evidence.*

It is also obvious that there is a complete absence of evidence that Parker committed the offense which the grand jury endeavored to charge in the indictment. The gist of this offense is that Phoebia Quattlebaum's name was forged. See *Thulemeyer* v. *State*, *supra*, 38 Tex. Cr. R. 349, 43 S.W. 83, 84. The statute (Art. 979, Vernon's Penal Code of Texas), requires that the writing be "without lawful authority" and the cases demand that this want of authority be proved beyond reasonable doubt like all other elements of the offense. See *Brown* v. *State*, 55 Tex. Cr. R. 9, 114 S.W. 820, 822; *Turner* v. *State*, 146 Tex. Cr. R. 474, 176 S.W. 2d 327, 328. While Elzie Quattlebaum testified that he did not give Parker permission to write his name (R. 59-60), the only evidence as to authority extended by Phoebia Quattlebaum was Elzie's testimony that his mother "didn't authorize anyone to use that signature" (R. 65). This is clearly hearsay, of course, and the Texas cases hold that hearsay has no probative value and will not support a verdict even if admitted without objection. *Smith* v. *Lynn*, 152 S.W. 2d 838, 840, quoting 17 Tex. Jur. Evidence, Sec. 416. And although the sheriff testified that Parker had admitted writing the checks (R. 68), there was no admission that Parker lacked authority from Phoebia Quattlebaum to do so. Indeed, the State's own evidence proved that Parker claimed to have authority to write

checks in Phoebia Quattlebaum's name—the bank teller testified that when one of the checks was returned Parker told her "that he had contacted this person and she had told him to write another check" (R. 70).

It has long been the rule in Texas that:

> "Where the defendant does not testify in the case, and where the State in developing its case in chief introduces in connection with a confession or admission of the defendant an exculpatory statement which if true would entitle him to an acquittal, the jury should be told that he is entitled to a verdict of not guilty unless such exculpatory statement has been disproved or shown to be false by other evidence in the case." *Otts* v. *State*, 116 S.W. 2d 1084, 1088. See *Robidoux* v. *State*, 34 S.W. 2d 863, and *Turner* v. *State*, 176 S.W. 2d 327, 328-329.

Thus Parker's statement to the bank teller alone was enough to render the evidence insufficient, since there is no evidence with probative value indicating that Parker's claim of authority was false.

Moreover, Texas law expressly provides that the confessions or admissions of a defendant made in jail or while in custody of a police officer are inadmissible unless in writing, with some exceptions not applicable here. Art. 727, Vernon's Code of Criminal Procedure of Texas. Thus the sheriff's testimony as to Parker's oral statement could never have been properly admitted if Parker had known enough law to object. Yet this testimony by the sheriff was the sole evidence referred to by the Texas Court of Criminal Appeals in upholding Parker's conviction! See Appendix A to this brief.

It is difficult to tell what Parker was trying to prove with the testimony of the witnesses he called on his own

behalf (R. 71-76). It is not at all hard to recognize, however, that the State took advantage of Parker's fumbling effort to defend himself and succeeded in introducing evidence which never would have found its way into the record if a lawyer had been at Parker's side.

The thrust of the testimony of Parker's witnesses was that Parker was sick, although there was some testimony which might refer to general character. If these witnesses were supposed to be general character witnesses, the State had no right to show specific acts of misconduct by Parker on cross-examination. See *Shipley* v. *State*, 100 S.W. 2d 704, 706. Nevertheless, the State was allowed to ask one of them whether he had received some "hot checks" from Parker (R. 76). The State was also allowed to prove, apparently in "rebuttal" as to Parker's character, that Parker was under indictment in another case (R. 76). Even if Parker had testified in his own behalf, and he did not, the introduction of such evidence is prohibited by the clear and unequivocal language of Art. 732a, Vernon's Code of Criminal Procedure.

The truth of the matter is, of course, that no lawyer in his right mind would have injected Parker's character into evidence, considering his record. Once having done so, however, any competent counsel would be expected to recognize that Parker's record was never properly proved. The sheriff's recitation from a paper not shown to be authenticated in any way and not introduced in evidence is nothing more than hearsay. See *Hines* v. *State*, 248 S.W. 2d 156.

When a defendant is tried without a lawyer in Texas, the judge has at least some affirmative duty to protect the rights of the accused by excluding inadmissible evidence. *Randolph* v. *State*, 265 S.W. 2d 114, 115. The trial judge's abdication of this responsibility might alone have been

reversible error, if a lawyer had been available to assist Parker in presenting the point to the Texas Court of Criminal Appeals.

3. *Instructions to the Jury.*

Although this was a jury trial, the jury was never given a real chance to decide the issues presented by the evidence, because the trial judge's instructions wholly failed to identify those issues for the jurors. As noted earlier in this argument, Parker was entitled to an instruction that the State must disprove his exculpatory statement to the bank teller. Furthermore, since her testimony raises the affirmative defense of authority to sign the checks, Parker was entitled to a specific instruction explaining the State's responsibility to prove lack of authority beyond reasonable doubt.

> "It is a well-settled rule in this state that a defendant is entitled to an affirmative instruction upon every issue raised by the evidence, whether such evidence was produced by the state or the defense and whether it be strong or feeble, unimpeached or contradicted." *Matterson* v. *State*, 152 S.W. 2d 352, 354-355.

Neither of the above instructions may be found in the trial court's charge (R. 23-26). As a matter of fact, the charge nowhere advises the jurors that it is Phoebia Quattlebaum's signature which must be proved beyond reasonable doubt to have been forged without lawful authority.

4. *Denial of Due Process of Law.*

With knowledge of the legal defects in this record under Texas law, it is difficult to understand how the majority of the Court of Appeals could have concluded that Parker received a fair trial. The answer must be that the majority

of the judges on the Court of Appeals did not realize how far Parker had been overreached because no lawyer appeared for Parker to tell that court either." Yet without considering the points of Texas law discussed above, Judge Rives in his dissent aptly summarized the evidence and Petitioner's position as follows:

> "Any person with the slightest experience in the trial of criminal cases would know that after that testimony conviction of the defendant was a foregone conclusion. Further, his conviction was assured not because he was guilty of the offense for which he was indicted, but because, under that testimony, he was an habitual forger, still continuing his criminal career, and under indictment, whether guilty or not, for another offense of forgery. Those were not the issues on which Parker was entitled to be tried.
>
> "Upon such a record, it would appear that Parker's efforts to defend himself were little short of farcical. In view of the small amounts of the checks, his family connection with the Quattlebaums, and the open way in which the checks were payable to and endorsed by Parker, it is quite possible that he may have had a defense to the charge of forgery, or at least that mitigating circumstances might have been shown. The record of Parker's trial for forgery shows that he suffered badly from the lack of assistance of counsel, and tends to corroborate his claim of extreme illness" (R. 89-90).

In the majority opinion, the Court of Appeals quoted from this Court's opinion in *Betts* v. *Brady*, 316 U.S. 455, 471-472, to the effect that "in the great majority of the States, it has been the considered judgment of the people, their representatives and their Courts that appointment

of counsel is not a fundamental right, essential to a fair trial." This is no longer the view in Texas. Since Parker's petition for certiorari was granted by this Court, the Texas Legislature has amended Article 494, Vernon's Code of Criminal Procedure, to require appointment of counsel for any accused who is charged with a felony and is too poor to employ an attorney, rather than only those who are arraigned for a capital offense. See Vernon's 1959 Texas Session Law Service, Pamphlet 5, Page 1061. Moreover, the Court of Criminal Appeals of Texas has begun to accord fuller significance to the decisions of this Court as to the duty of trial courts to appoint counsel for indigent defendants in serious criminal cases. Its most recent decision in this area is *Moore* v. *State*, 324 S.W. 2d 879 (May 13, 1959) which accepts the doctrine set forth by this Court in *Cash* v. *Culver*, 358 U.S. 633, that a defendant is denied due process of law when he is put to trial without a lawyer, at least in a complex case.*

George Lee Parker did not get the benefit of this new statute or of this shift in emphasis by the Court of Criminal Appeals. In denying his petition for habeas corpus, that court summarily held that Parker had not alleged sufficient facts to require appointment of counsel, and then itself provided evidence of Parker's need for counsel by pointing out that he did not raise the question of his illness properly by a "motion for continuance" at the time of his trial.

It is difficult to believe that either the Texas Court of Criminal Appeals or the lower federal courts would have rejected Parker's petition if they had had the benefit of

* It is interesting to note that the *Moore* opinion as published in the Southwestern Reporter shows an appearance of counsel for Moore on appeal. Perhaps the Court of Criminal Appeals would have taken a different view of Parker's record if he could have had legal counsel to focus his legal rights and arguments there.

this Court's opinion in *Cash* v. *Culver*, which was decided after Parker's petition for certiorari had already been filed. Indeed, this Court could well have been speaking of Parker instead of Cash when it stated:

> "In the 17 years that have passed since its decision in Betts v. Brady, 316 U.S. 455, this Court, by a traditional process of inclusion and exclusion has, in a series of decisions, indicated the factors which may render state criminal proceedings without counsel so apt to result in injustice as to violate the Fourteenth Amendment. The alleged circumstances of the present case so clearly make it one where, under these decisions, federal organic law required the assistance of counsel that it is unnecessary here to explore the outer limits of constitutional protection in this area.
>
> 'Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair,' the Constitution requires that the accused must have legal assistance at his trial. Uveges v. Pennsylvania, 335 U.S. 437, 441. Of particular relevance here are the decisions of the Court which have held the appointment of counsel necessary to a fair trial because of the complexity of the proceedings. Rice v. Olson, 324 U.S. 786; Gibbs v. Burke, 337 U.S. 773; and see Williams v. Kaiser, 323 U.S. 471, 475-476." 358 U.S. at 636-637.

Here, as with Cash, "The problems which this testimony raised were thus beyond the ken of a layman, and it was clearly the kind of testimony that could seriously damage a defendant in the eyes of a jury." Here, as in that case,

a lawyer would have found innumerable "opportunities of which we cannot assume that a layman would be aware." 358 U.S. at 638.

The only significant difference from Cash's case is that here the facts have been fully developed by affidavit. As the Court of Appeals recognized, they are "without dispute on any material point." The opinion in *Cash* v. *Culver* is so directly applicable to these facts that on its authority this Court with entire propriety could have summarily reversed the decisions of the lower courts. Moreover, under 28 U.S.C. §§1651, 2106 and 2241, this Court had full authority either to remand the cause to the trial court or to grant the writ of habeas corpus itself.

II.

This Court Should Exercise Its Discretionary Authority to Issue a Writ of Habeas Corpus Nunc Pro Tunc as of a Date While Petitioner Was Still in the Custody of Respondent.

On June 6, 1959, George Lee Parker was released from the Huntsville State Penitentiary, having served his seven-year sentence with time off for good behavior. This was more than three years after he applied to the U. S. District Court for a writ of habeas corpus, more than seven months after his petition for certiorari was filed, and more than three months after certiorari was granted by this Court.

If Parker had had counsel to guide him expeditiously through the maze of procedural requirements; if his petition for certiorari had been granted promptly enough to permit argument and decision during the 1958 term; or even if petitioner had slugged a guard or otherwise sacrificed his time off for good behavior,—then he would still have an opportunity to clear his name of this conviction.

None of these things happened, and Petitioner has now been released from custody. The basic question is whether such release terminates this Court's jurisdiction to enter a decree reversing the erroneous decisions of the lower federal courts in this case.

28 U.S.C., Section 2241, gives this Court, as well as the U. S. District Courts, power to grant the writ of habeas corpus. The statute also provides that the writ shall not extend to a prisoner unless he is in custody. It is submitted, however, that this Court has full jurisdiction and authority to enter a judgment issuing a writ of habeas corpus as of a date prior to petitioner's release from custody, under the traditional and inherent power of courts to enter decrees and judgments *nunc pro tunc*.

As is stated in 1 Freeman on Judgments:

> "The power to enter judgment nunc pro tunc is not confined to trial courts, but is exercised also by courts of appeal whenever the circumstances make such action appropriate, as where one of the parties has died pending an appeal or writ of error and before decision. If a cause is argued and submitted either upon the merits or upon motion to dismiss the appeal, and thereafter one of the parties dies, the final judgment of reversal or affirmance or dismissing the appeal will be entered as of some day prior to the death of the party but subsequent to the argument." Pp. 250-251.

Freeman also points out that this inherent judicial power is not dependent on any statute, and may be exercised in criminal as well as in civil actions. *Id.* at pp. 221, 252.

An example of this Court's exercise of such power is *Quon Quon Poy* v. *Johnson*, 273 U.S. 352, a habeas corpus proceeding where the petitioner was remanded to the

custody of the Commissioner of Immigration after the latter's death, *nunc pro tunc* as the day on which the case was argued and submitted. See also *Harris* v. *Commissioner*, 340 U.S. 106, 112-113.

Judgment *nunc pro tunc* is particularly appropriate where delay has resulted from acts of the court. In *Mitchell* v. *Overman*, 103 U.S. 62, 64-65 (1880), this Court stated:

> "The adjudged cases are very numerous in which have been considered the circumstances under which courts may properly enter a judgment or a decree as of a date anterior to that on which it was in fact rendered. It is unnecessary to present an analysis of them, some of which are cited in a note to this opinion. We content ourselves with saying that the rule established by the general concurrence of the American and English courts is, that where the delay in rendering a judgment or a decree arises from the act of the court, that is, where the delay has been caused either for its convenience, or by the multiplicity of press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered upon. In such cases, upon the maxim actus curiae neminem gravabit,—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice,—it is the duty of the court to see that the parties shall not suffer by the delay. A *nunc pro tunc* order should be granted or refused, as justice may require in view of the circumstances of the particular case."

In the present case, if the U. S. District Court had appointed counsel for Parker as he requested (R. 15, 44, 53), it is inconceivable that it would have taken him more than three years to reach this Court. Moreover, if Parker had had counsel or had even been financially able to proceed in this Court without the time-consuming impediments of *in forma pauperis* procedures, his petition for certiorari filed on October 24, 1958, might well have been granted in time for the Court to hear argument and decide the merits before his release from custody last June.

In any event, as was stated above, this case comes so clearly within the doctrine enunciated last February in *Cash* v. *Culver*, 358 U.S. 633, that this Court could have summarily reversed the lower court's decision without argument. Perhaps it would have done so if it had been aware of the imminence of petitioner's release from custody. This case was ripe for judgment when certiorari was granted. Issuance of a writ of habeas corpus as of that date would have been—and is now—entirely appropriate.

This Court has long recognized that "convictions may entail collateral legal disadvantages in the future." *Pollard* v. *United States*, 352 U.S. 354, 358. On that basis the Court has ruled on the merits of petitions collaterally attacking the validity of federal sentences under 28 U.S.C. §2255 after the petitioner's release, even though that statute, like 28 U.S.C. §2241, applies to "a prisoner in custody." See *Pollard* v. *United States* and the cases there cited.

The same considerations are applicable, and the same result should be reached, in cases involving collateral attacks on state court sentences by habeas corpus. Indeed, the Court of Appeals for the Ninth Circuit, relying on the *Pollard* opinion, has already reached such a result. In *Dickson* v. *Castle*, 244 F. 2d 665 (1957), although upholding

the denial of habeas corpus on other grounds, that court ruled:

> "Subsequent to the submission of this appeal to this court it appears that appellee was unconditionally released from the custody of appellant by order of the California Adult Authority.
>
> "The initial question presented, therefore, is whether this appeal is moot. We hold that under the rule announced by the Supreme Court in *Pollard* v. *United States*, 1957, 352 U.S. 354, 358, 77 S.Ct. 481, 1 L.Ed. 2d 393, it is not, and we therefore proceed to consider the issues presented by this appeal."

Moreover, in *Heflin* v. *United States*, 358 U.S. 415, 420, a majority of this Court, speaking through Mr. Justice Stewart, equated the custody requirement under §2255 with that under §2241 in refusing to grant relief under §2255 from an illegal sentence when the prisoner was validly in custody under another charge. This equation should be similarly applied to grant to Parker the review on the merits which Pollard received.

This is not a case where, as in *Heflin* or in *McNally* v. *Hill*, 293 U.S. 131, the prisoner was legally in custody under another charge when his petition was filed. When Parker filed his petition he was in custody pursuant to a conviction which he claims was in violation of his rights under the Fourteenth Amendment to the United States Constitution. He remained in such custody until June 6, 1959. Issuance of the writ as of a date when petitioner was unlawfully in custody should meet fully the test laid down in the *McNally* and *Heflin* cases, as well as the statutory requirements of 28 U.S.C. §2241.

Since the power of any court to render judgment *nunc pro tunc* is discretionary, this Court need not fear that

any flood of prolonged or increased litigation would result from granting such relief in this case. By issuing the writ as of the day when certiorari was granted and Parker was still in custody, no other persons would be adversely affected and Parker's record would be cleared. By refusing to do so, this Court will be leaving in effect the erroneous opinion of the Court of Appeals for the Fifth Circuit and the federal stamp of approval which it places upon Parker's conviction, thereby invalidating all of Parker's years of efforts to clear his name of this charge.

Unless they are reversed, it seems inevitable that these erroneous decisions by the lower federal courts will continue to have adverse consequences for Parker. For instance, Article 3, Section 51-C of the Texas Constitution, as amended November 16, 1956 provides:

> "The Legislature may grant aid and compensation to any person who has heretofore paid a fine or served a sentence in prison, under the laws of this State for an offense for which he or she is not guilty, under such regulations and limitations as the Legislature may deem expedient."

Special acts have been enacted pursuant to such authorization; *e.g.*, Texas Laws 1957, Pages 1522, 1554 and 1621. Petitioner's chances to obtain such relief, or to obtain a pardon from the Governor restoring his civil rights in Texas, are obliterated by the opinions of the lower federal courts. On the other hand, a reversal by this Court would place petitioner in an excellent position to seek such relief.

More complex is the question of how this conviction affects Parker's voting rights. His record as provided by the State Department of Public Safety (R. 33) shows that Parker had previously been convicted of felonies in other states, but not in Texas. However, such record does

not purport to show whether or not he has been pardoned for such offenses. Article 5.01 of the Texas Election Code does not expressly refer to out-of-state convictions, simply disqualifying from voting "all persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned . . . " This is in contrast to the provision of other statutes such as Sec. 78 of the Texas Probate Code, which expressly provides that "no person is qualified to serve as an executor or administrator who is * * * (c) a convicted felon, under the laws either of the United States or of any state or territory of the United States, or of the District of Columbia . . . " Thus it can be argued that when the Texas Legislature intends to attach consequences of personal disqualification or disability to a felony conviction under the laws of some other state, the statute will contain an express provision to that effect. Moreover, the Texas Constitution vests the power to prescribe qualifications of voters squarely in the Texas Legislature, and such power cannot be delegated.

There is one case which has recently come to the attention of counsel for petitioner in which the Court of Civil Appeals for Amarillo, without citing any authority or discussing the above arguments, held in an election contest that a voter's prior conviction of a felony in another state invalidated his vote. *Harwell* v. *Morris*, 143 S.W. 2d 809. However, the Supreme Court of Texas did not review this case. There can be no assurance as to whether it would adhere to the *Harwell* decision or follow the doctrine of *Logan* v. *United States*, 144 U.S. 263, that in the absence of express statutory provisions to the contrary a conviction and sentence in another state has "no effect, by way of penalty, or personal disability or disqualification, beyond the limits of the state in which the judgment is rendered."

In addition to the effect on Parker's rights, there is another significant factor which should lead this Court to exer-

cise its discretion in favor of ruling on the merits. In its capacity as supervisor of the federal court system, this Court should not allow the erroneous opinion of the Court of Appeals for the Fifth Circuit to remain in force as a precedent for future litigation. Issuing the writ *nunc pro tunc* will give the Court an opportunity to correct such opinion, and to admonish both federal and state courts as to the rule which should be applied in cases such as this. The salutary effect of such pronouncements is evidenced by the reliance which the Texas Court of Criminal Appeals placed upon the *Cash* v. *Culver* opinion in the *Moore* case.

That the desirability of creating a precedent will justify issuing a writ *nunc pro tunc* is evidenced by the decision in *United States* v. *Paddock*, 68 F. Supp. 407 (W.D. Mo., 1946). There the court issued a writ of injunction, *nunc pro tunc*, against a deceased defendant accused of misbranding drugs in violation of the Federal Food and Drug Act. Although issuance of the injunction could hardly be expected to affect the future conduct of the deceased, it did create a precedent which may well have assisted in future enforcement of the Act. It should be much more important to correct an erroneous precedent in the form of an opinion by a United States Court of Appeals.

CONCLUSION

The refusal of the U. S. District Court and the Court of Appeals to grant the writ of habeas corpus sought by George Lee Parker is in direct contravention of the rule applied by this Court in the line of cases running from *Betts* v. *Brady* through *Cash* v. *Culver*. The errors discussed above and the complexity of the legal problems confronting Parker at the trial show clearly that without a lawyer he could not possibly have had the adequate and fair defense to which he was entitled under the Fourteenth Amendment. *Palmer* v. *Ashe*, 342 U.S. 134.